No. 79-1252 and 79-1502

JAN 13 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

SIERRA CLUB, ET AL.

AND

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

KERN COUNTY WATER AGENCY, ET AL., PETITIONERS

v.

SIERRA CLUB, ET AL.

AND

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS

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1. The private respondents (hereinafter referred to as "Sierra Club") and the National Wildlife Feder-

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[1] The federal respondents are aligned with petitioners in No. 79-1502 on the question addressed in this reply brief. This represents their first opportunity to respond to the arguments of the private respondents on this issue.

ation as amicus curiae (hereinafter referred to as "NWF") contend (Sierra Club Br. 17-47; NWF Br. 7-12) that the Congresses that passed the Rivers and Harbors Act of 1899 and the Rivers and Harbors Act of 1890, on which the 1899 Act was based, must have been familiar with the traditional common law tort rule that a private party may sue to enjoin a public nuisance where he suffers special damages from the nuisance and, therefore, must have also contemplated enforcement of the Acts in federal court by private parties. But the conclusion does not follow from the premise: the common law nuisance actions invoked as models bear little resemblance to enforcement of the 1899 Act, given the scheme for administrative review which Congress included in the Act.

As the court in *Piscataqua Nav. Co.* v. *N.Y., N.H. & H.R. Co.*, 89 F. 362 (D. Mass. 1898), reversed in part on other grounds, 108 F. 92 (1st Cir. 1901), an admiralty case on which both the Sierra Club and NWF rely (Sierra Club Br. 18, NWF Br. 10), explains (89 F. at 363), the special or particular damage that a private party must show in order to maintain an action against a public nuisance—his "actual loss, proved as a matter of fact"—is "the gist of the private action." Under such a theory, a private party whose injury is remediable in damages, recovers a sum of money in an action at law, and one whose injury cannot be thus remedied is entitled to injunctive relief, *e.g.* removal of the nuisance. Recognizing the difficulties inherent in permitting courts to order the removal of structures at the behest of private parties without regard to whether, in the judgment of the Corps of Engineers, the structures are unreasonable obstructions to navigation or even produce conditions in navigable waters that require scrutiny

by the Corps under Clause 3 of Section 10 of the 1899 Act, 33 U.S.C. 403, both the Sierra Club and NWF explain (Sierra Club Br. 65-66; NWF Br. 15-16) that no such relief is sought here.[2] In order to avoid "potential inconsistencies between administrative determinations of the legality of regulated activities and privately initiated judicial determinations of that same issue" (Sierra Club Br. 65), they suggest that the private actions with which they are chiefly concerned involve only ensuring that certain types of activities are submitted for approval (*ibid.*), and that the "carefully designed procedures" for agency review in Section 10 are followed (NWF Br. 15-16). The "gist" of this type of action, however, is not the damages of the plaintiff but the question whether the defendant should seek, or may be granted, an administrative permit.[3]

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[2] At least one court that has allowed maintenance of a private action under Section 10 of the 1899 Act has recognized this problem. In *River* v. *Richmond Metropolitan Authority*, 359 F.Supp. 611, 639 (E.D. Va.), aff'd per curiam, 481 F.2d 1280 (4th Cir. 1973), the court observed:

> It may be that an injunction ordering the removal of an already constructed obstruction is not available to a private litigant, since this form of relief approaches closely the civil remedy given to the United States. The Court can well see how the hardship which such a removal would normally involve might well have prompted Congress to have phrased the statute so that only the United States, in its discretion, might apply for such relief. An injunction against planned construction * * * does not suffer from such infirmities, however.

[3] The district court's findings respecting injury to the Sierra Club and to the two individual plaintiffs were clearly inadequate to sustain the injunctive relief, even assuming that a federal action based on Section 10 of the 1899 Act may be main-

The congressional plan for relying on the expertise of the Corps of Engineers may be accommodated to some degree in private lawsuits where there have been official administrative findings that a structure constitutes an unlawful obstruction of navigation (see *E. A. Chatfield Co.* v. *City of New Haven*, 110 F. 788, 793-794 (D. Conn. 1901) (failure to make alterations to bridge declared by the Secretary of War to be a violation of Section 18 of the 1899 Act, ch. 425, 30 Stat. 1153-1154, and private suit to enjoin maintenance of the bridge allowed to proceed on that finding); but neither this type of accommodation nor what amounts to the "primary jurisdic-

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tained by one suffering special injury different in degree or kind from that suffered by the general public. The district court findings to which the Sierra Club refers (Sierra Club Br. 2) state only that Delta water levels were lowered at certain points and that net flow reversals occurred in the San Joaquin, Old, and Middle Rivers (Pet. App. 88-91), and the stipulated pre-trial order, also relied on (Sierra Club Br. 2) is to the same effect (J.A. 95a). This hardly establishes special injury—or indeed any injury at all—to plaintiff Hank Schramm, who was found by the district court to engage in commercial fishing and to operate sports fishing party boats in San Francisco Bay and the Pacific Ocean, or to plaintiff William Dixon, who was found to be the owner of land in the Delta area and a part interest in a duck club there, but for whom no connection of any kind between the specific flow reversals or water level reductions was found (Pet. App. 67-68). The interests of the Sierra Club members as found by the district court—use of the waters in question "for recreational purposes"—did not differentiate the members from the general public, who could be expected to use the waters for similar purposes and who would suffer injury of the same degree *and* kind as a result of any change in the waters that might prevent such uses. See *Silvey* v. *Commissioners of Montgomery County, Ohio*, 273 F. 202, 204 (S. D. Ohio 1921); *Carver* v. *San Pedro, L.A. & S.L.R. Co.*, 151 F. 334, 335 (S.D. Cal. 1906).

tion" solution proposed by the Sierra Club and NWF is a feature of the traditional common law nuisance action that they presume to find as an implicit part of the congressional scheme in the 1890 and 1899 Acts. While one might argue, as the Sierra Club does (Sierra Club Br. 38-40), that the silence of Congress may not be taken as evidence of an intent to deny a pre-existing remedy, one cannot persuasively argue that a hybrid comprising features of an existing private remedy and a statutory scheme incorporating "carefully designed procedures" for agency review (NWF Br. 15) can be implied from the statute in the absence of any suggestion in the legislative history of an intent to create such a modified remedy.

2. The Sierra Club mistakenly contends (Sierra Club Br. 56-57) that the opinions in *Cummings* v. *Chicago*, 188 U.S. 410 (1903), and *North Shore Boom & Driving Co.* v. *Nicomen Boom Co.*, 212 U.S. 406 (1909), support its position that the 1899 Act includes a private right of action to enforce the Act. In *Cummings*, the plaintiffs sought to rely on the Constitution, several acts of Congress, including the 1899 Act, and a permit from the Secretary of War as sources of a "Federal right" to build a dock in the Chicago River in defiance of the authority of Chicago and the State of Illinois. 188 U.S. at 426-427. The Court merely held that the claim of a federal right established federal question jurisdiction. *Id.* at 426. Such a holding is not inconsistent with the proposition that court enforcement of the 1899 Act against violators is exclusively entrusted to the federal government, as provided in Sections 12 and 17 of the 1899 Act, 33 U.S.C. 406 and 413.

North Shore Boom is similarly unhelpful to the Sierra Club. The Court dismissed this state court

case involving a dispute between two boom companies, each possessing Section 10 permits to construct booms in the same intrastate river, on the ground that the state court's determination that defendant's construction was unauthorized rested entirely on defendant's failure to comply with state law and thus presented no federal question. We agree with the Sierra Club that it would be going too far to say that the Court in that case "intimat[ed] that the underlying cause of action might not be sustainable because of the unavailability of a 'private right of action' to enforce the Act" (Sierra Club Br. 57), but it is surely noteworthy that the Court rejected the defendant's attempt to rely on *United States* v. *Bellingham Bay Boom Co.*, 176 U.S. 211, 218 (1900), in part on the ground that this case "is not brought by the Government under the section above mentioned [Section 10 of the 1890 Act], but * * * concerns private parties only * * *." *North Shore Boom & Driving Co.* v. *Nicomen Boom Co., supra*, 212 U.S. at 413. Moreover, in describing *Bellingham*, the Court stated that the suit there had been "brought to enforce *the right of the Government* to prevent the erection of a structure that obstructed the navigation of the river." *Ibid.* (emphasis supplied).

3. In their discussion of the Senate debate on provisions that were included in the 1890 Act and on related rejected amendments, the Sierra Club and NWF both rely on remarks of Senator Vest to the effect that if the Secretary of War is given no authority to remove a bridge that constitute obstructions to navigation, its removal can be achieved only in a nuisance action brought by private citizens (Sierra Club Br. 36-38; NWF Br. 11). Their discussion of Senator Vest's remarks, however, omits certain important details.

Senator Vest was commenting on the provisions that became Sections 4 and 5 of the 1890 Act, ch. 907, 26 Stat. 453 (later combined as Section 18 of the 1899 Act, ch. 425, 30 Stat. 1153-1154, now codified at 33 U.S.C. 502). 21 Cong. Rec. 8603 (1890). Those provisions make it the duty of the Secretary of War (later the Secretary of the Army), when he has good reason to believe that a bridge constitutes a navigational obstruction, to order the bridge owners to make such alterations in their bridge as the Secretary deems necessary to keep navigation unobstructed; if they fail to comply, the Secretary is to notify the district attorney to initiate criminal proceedings. Senator Vest spoke in favor of entrusting the Secretary with that power to determine that a bridge constitutes an obstruction because the past efforts of private citizens in nuisance actions had met with little success. 21 Cong. Rec. 8603 (1890). The specific example recited by the Senator concerned a group of Missouri citizens who had no money to institute proceedings themselves and who made "[a]pplications * * * to United States authorities at St. Louis" and found that "they had no law under which to proceed." *Ibid.* Senator Vest continued (*ibid.*) (emphasis supplied):

> It goes without saying that when one of these bridges is constructed it stands there until the Federal Government causes it to be removed. There is no power that is able *to enforce* what should be the law in regard to the navigation of rivers except the power of the Government of the United States. * * *

It seems clear from this and from his subsequent remarks concerning the power of the railroad corporations to protract court proceedings (*ibid.*) that

Senator Vest believed that federal *enforcement* of a law against navigational obstructions was the critical need, and that efforts by others were of little, if any use against the resources of the railroad corporations that built most of the offending bridges.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed with directions that the complaint be dismissed for failure to state a claim. Should the Court, however, hold that plaintiffs were entitled to bring this action to enforce Section 10 of the Rivers and Harbors Act of 1899, then the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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